Between cunning states and unaccountable international institutions: social movements and rights of local communities to common property resources

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Between Cunning States and Unaccountable International Institutions: Social Movements and Rights of Local Communities to Common Property Resources

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Abstract

The paper analyses the new architecture of global governance which is characterised by unaccountable international institutions and scattered sovereignties. It examines the dilemmas of civil society actors (social movements and NGOs) involved in protecting the rights of local communities through strategic issue-based alliances with the state or the World Bank, whose legitimacy they question in other contexts. The cunning state remains a central actor in selectively transposing neo-liberal policies to the national terrain and capitalises on its perceived weakness in order to render itself unaccountable to its citizens. The argument draws on empirical material from India around conflicts over the patenting of genetic resources, biodiversity conservation, forced displacement and privatisation of common property resources. It cautions against attributing homogeneity to the state whose logic of action may differ at the federal and regional level; it delineates the shifting contours of the boundary between the public and the private as well as the growing entanglement between civil society and state; and it unpacks civil society to show that there is little in common between advocacy networks involved in a politics of contention and powerful NGOs rendering expert advice to states and international institutions.

Zusammenfassung:

Dieser Aufsatz untersucht die neue Architektur des “globalen Governance”, die durch nicht-rechenschaftspflichtige internationale Institutionen und geteilte Souveränität gekennzeichnet ist. Er analysiert die Dilemmata zivilgesellschaftlicher Akteure (soziale Bewegungen, NROs), die kurzfristige strategische Bündnisse mit dem Staat oder der Weltbank eingehen, um die Rechte lokaler Gemeinschaften schützen zu können. Der „listige Staat“ ist zugleich Opfer wie Gestalter neoliberale Prozessen und versucht Kapital aus seiner vermeintlichen Schwäche zu schlagen, um sich der Verantwortung gegenüber den eigenen Bürgern zu entziehen. Die Thesen des Aufsatzes stützen sich auf empirisches Material aus Indien zur Patentierung genetischer Ressourcen, dem Schutz der Biodiversität, der Zwangsumsiedlung, und der Privatisierung allgemein zugänglicher natürlicher Ressourcen. Es wird gezeigt, dass der Staat nicht als homogener Akteur gesehen werden darf, da sich die Logik staatlichen Handelns auf der föderalen und der regionalen Ebenen unterscheidet. Indem die Politik der basisnahen Netzwerke, die gegen den Staat mobilisieren, von den einflussreichen NROs, die den Staat und internationale Institutionen als Experte beraten, differenziert wird, lässt sich einerseits die sich verändernde Grenzziehung zwischen Öffentlichem und Privatem thematisieren, andererseits können die zunehmenden Verflechtungen zwischen Zivilgesellschaft und Staat erörtert werden.

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Introduction

This essay delineates various trajectories of globalization and their contestation by examining the interplay between international institutions (the World Bank, IMF and WTO), civil society actors (social movements and NGOs) and the state. Using empirical material from India two kinds of conflicts are analyzed: (i) the clash between environmental conservation and human rights, and (ii) the collision between the right to livelihood of local communities dependent on common property resources and a model of economic growth based either on state-led development or on privatization managed by the state. The case studies focus on the constrained yet central role of the state in transposing processes of globalization into the national arena. They remind us that globalization as locally experienced involves the activities of multinational corporations, the impact of WTO rules and World Bank credit conditionalities , state (in)action in enforcing these regimes, the risks of displacement due to development projects, impoverishment and exclusion in the wake of market fundamentalism, global discourses of biodiversity and indigenous peoples' rights as well as the local politics of transnationally linked social movements. Given its centrality to the neo-liberal restructuring of governance both within and beyond the nation-state, law provides an important vantage point from which to study some of these facets of globalization and the resistance to it.

The case studies analyzed below show a diversity of supra-state and non-state actors at work in varying alliances with one another at the local, national and supranational levels. But they also demonstrate that the state is not merely a victim of neo-liberal economic globalization as it remains an active agent in transposing it nationally and locally. The monopoly of the state over the production of law is certainly being challenged both by international institutions and by civil society actors, subnational as well as supranational (Günther and Randeria, 2002). However, in contradistinction to the widespread diagnosis of the consequent decline of the state and a dismantling of its sovereignty, I argue in the first section that it would be a mistake to take this self-representation of states at its face value. We are faced not by weak, or weakening, states but by cunning states[1] which capitalize on their perceived weakness in order to render themselves unaccountable both to their citizens and to international institutions (Randeria, 2001, 2002c).

The second section uses the successful struggle against patents on the Neem tree to illustrate six theses on the transnationalization of law, state sovereignty and the role of civil society actors from a post-colonial perspective. The paradoxical consequences of the World Bank supported biodiversity project for the protection of lions in Gujarat, western India are considered in the third part. The next section deals with the network 'Campaign for Peoples' Control Over Natural Resources' which is

[1] My thanks to Ivan Kristen for suggesting this term to me to describe the new strategies of the subaltern state in relation to supranational institutions.

contesting the state–market nexus involved in privatization at the expense of the poor. The global success of the transnational movement against the Narmada dam which, however, failed to translate into local gains for those displaced by the project is the subject of the fifth part. Finally, I discuss the disappointing experience of civil society actors who filed claims on behalf of those adversely affected by World Bank projects before the Inspection Panel, an innovative transnational legal arena which has failed to realize its potential so far.

1. The Cunning State, Unaccountable International Institutions and the Paradoxes of Democratization

Due to its salience in domesticating neo-liberal policies, the state remains an important interlocutor for civil society actors challenging these policies or seeking to mitigate their effects. However, grassroots NGOs and social movements in India are not only engaged in a struggle against the state and international institutions for the protection of the rights of indigenous peoples and other local communities over common property resources but are proactive in formulating new norms weaving together traditional collective rights, national laws, and international standards. Their struggle for environmental justice is being waged through broad based political mobilization and media campaigns but equally through the increasing use of national courts and international legal fora. The latter includes the Inspection Panel at the World Bank whose very genesis owes a great deal to the transnational coalition against the Narmada dam in western India (Randeria, 2001, 2002a, 2002c).

An important dynamic in the local transposition of neo-liberal globalization consists in a part transnationalization and part privatization of the state which increasingly effaces, on the one hand, the boundary between the national and supranational and, on the other, between state and civil society. Both contribute to what I have elsewhere described as the new pattern of ‘scattered sovereignties’ (Randeria, 2001). The resulting reconfiguration of the state includes the selective implementation by the state of norms and policies designed by supranational institutions like the World Bank and the IMF and imposed in the form of ‘credit conditionalities’ (Moore, 2000) or of ‘project law’ (Benda-Beckmann, 2001). The distinction between law and public policy becomes increasingly blurred as rule-making is increasingly placed outside the arena of legislative deliberation and democratic decision-making (Randeria, 2003). But an analysis of processes of *‘glocalization’* needs to go beyond unpacking the state in terms of its legislative, administrative and judicial institutions each with their own logics. It must also include both an analysis of the decentralization of the state and devolution of powers to regional and local governments as well as to NGOs which have taken over many of the functions of the state. If the state at the national level has lost some of its powers, the regional governments have gained in influence as they now negotiate directly

with the World Bank and try to implement investor-friendly policies in a bid to attract domestic and foreign capital. Therefore, the dynamics of glocalization are best studied at the level of the different regional governments in India. Two of the case studies in this paper will unravel some of these transformations, therefore, using empirical material from the province of Gujarat in Western India.

The new architecture of unaccountable global governance facilitates 'passing the power', a game in which international institutions claim themselves to be utterly powerless servants of their member states, and states in turn capitalize on their perceived powerlessness in the face of prescriptions from Washington DC or Geneva (Randeria, 2001). This creates dilemmas for civil society actors for whom the state is both an ally and an adversary depending on the context. On the one hand, they need the state in order to protect the rights of citizens *vis-à-vis* multinational corporations and international institutions. On the other hand, civil society actors increasingly use the international arena and transnational political spaces to bypass the state, as for example, in the case of the anti-Narmada dam movement discussed below, in order to directly address supranational institutions whose policies directly affect the lives of poor citizens.

Much of the literature on globalization emphasizes the increasing marginality of the state and its retreat in the face of inroads by global capital. In contrast, I have argued that the state continues to play a pivotal role in transposing and shaping neo-liberal globalization at the national and local level. In order to grant multinational corporations licenses to exploit natural resources, the Indian state amended its laws and policies on mining and minerals under pressure from the World Bank to facilitate private investment, foreign and domestic, in the sector reserved exclusively for the state sector until recently. And it is the use by the Indian state of its land acquisition policy of colonial provenance to acquire land for industry which has led to forcible displacement on a large scale. The state has permitted the setting up of private industries in areas inhabited largely by indigenous communities and granted to corporations mining licenses, tax and labor law concessions, and favorable terms of operation in contravention of many of its own laws and policies (Kumar and Shivalkar, 2001).

While recognizing the new constraints on the freedom of the state to design and implement their own laws and policies, it would be a mistake to accept the self-representation of the cunning state about its own weakness. The government of India has definitely not implemented all the policy reforms demanded by the World Bank and the IMF nor enacted all the legal changes suggested by it. Invoking national sovereignty, it has refused to allow the Inspection Panel of the World Bank to investigate complaints by Indian citizens adversely affected by World Bank projects as we will see below. Nor has it agreed to the full convertibility of the Rupee, for example, and has complied only partially, selectively, or half-heartedly with other conditionalities like deregulation of the labor market or privatization of state enterprises. In contradistinction to weak states like Bangladesh or Benin, cunning

states like India certainly have the capacity to decide which of the remedies prescribed in Washington for the ills of the national economy should be administered selectively to different sections of the population.

Contrary to the rhetoric of many globalization theorists and of political elites, the state is not being rolled back as a rule making or rule enforcing agency. In an age of scattered sovereignties, it has merely lost its monopoly over the production, adjudication, and implementation of law, if given the plurality of post-colonial legal landscapes it ever had such a monopoly (Randeria, 2002a, 2002b). The World Bank's 1997 World Development Report titled *The State in a Changing World* reflects the new role of the state as envisaged by international institutions. The post-structural-adjustment state is conceived of by them as an 'enabling state', as one arena of regulatory practice among others (Gill, 1999). The prescribed goal of 'good governance' entails restructuring of the state to ensure the "reliability of its institutional framework" and "the predictability of its rules and policies and the consistency with which they are applied" (World Bank, 1997: 4–5). The policies and rules themselves, however, are insulated from public deliberation and parliamentary decision-making resulting in a "democracy without choices" (Krastev, 2002). Elections in such a situtation result merely in a change of parties or of leaders but the voters are unable to influence policy changes.

My argument will be that despite its decentering, and restructuring through the workings of international institutions and the market, the state remains an important albeit contested terrain in processes of globalization. So that all laments about the loss of state sovereignty to the contrary, legislative enactments, judicial decision-making and administrative (in)action will continue to affect the way processes of globalization are mediated, experienced, and resisted in India. By grounding the experience of globalization in an empirical study of resistance against forced displacement and an examination of local struggles over access to natural resources, I seek to link everyday life in rural India to transnational flows of capital and the policy discourses which travel with them. By analysing the global as part of the local, such an exercise can contribute to an understanding of the specificities of local transformations and the power relations that shape them. As the case studies discussed here show, law is an increasingly important, if ambivalent, arena in which to contest interpretations of environmental standards, human rights and the public good, the regulation of the environment or access to common property resources.

2. NGOs Challenge U.S. Patent on the Indian Neem Tree in Munich

On the 9th and 10th of May 2000, the fate of the Indian Neem tree hung in balance in Room 3468 of the European Patent Office in Munich. At issue was the legitimacy of a

patent for a method of preparing an oil extract from the seeds of the tree to be used as a pesticide, one of 14 patents on products of the Indian Neem tree granted by the Munich authority. The American transnational corporation W.R. Grace and the U.S. Department of Agriculture, joint owners of six of these patents, were represented by a lawyer's firm in Hamburg. Ranged against them was a transnational coalition of petitioners asking for the patent to be revoked: Vandana Shiva, Director of the Research Foundation for Science, Technology, and Ecology; Linda Bullard, President of the International Federation of Organic Agricultural Movements, and Magda Alvoet, currently the Belgian Health and Environment Minister. They were represented by a Swiss Professor of Law from the University of Basel.

The representatives of the U.S. chemical concern remained silent throughout the two days of hearing. It was the silence of the powerful, of those who knew that time, money and the government of the Unites States of America were on the side of U.S. corporate interests. The European Patent Office heard the powerful political arguments of Vandana Shiva on 'biopiracy' and intellectual colonialism as well as the testimony of the Sri Lankan farmer, Ranjith de Silva, on the moral illegitimacy of a patent that disregards centuries of traditional local knowledge. But what ultimately counted for the Opposition Division Bench hearing the case were measurements of centrifugation, filtration, and evaporation in the testimony of Abhay Phadke, an Indian factory owner. His firm near Delhi has been using since 1985 a process very similar to the one patented by the American multinational corporation and the US Department of Agriculture to manufacture the same product in India. At the end of a five-year legal battle on the 10th of May 2000 the European Paten Office revoked the patent on the grounds that the process patented by the Americans lacked novelty.

The story of the struggle around the Indian Neem tree serves to illustrate six theses on the transnationalization of law, the role of the state as an architect but also a victim of globalization, and the role of civil society actors in mobilizing local protest as well as in creating alternative norms.

2.1. Hegemonic vs. Counter-Hegemonic Globalization:

The European Patent Office in Munich was the scene of a conflict between two visions of globalization and over its future shape and direction. The battle lines were drawn here as in Seattle between proponents of a neo-liberal globalization for profit and its globally-networked civil-society opponents. As actors in an emerging global civil society, transnationally networked farmers' movements and environmental NGOs in India are among the most ardent opponents of a new international legal regime of 'intellectual property rights' that provides transnational corporations (TNCs) in the North cheap and easy access to the natural resources of the South. They have argued that the increasing commercialization of common property resources turns common heritage into commodities, jeopardizing the biodiversity of agricultural crops,

threatening the livelihood of poor primary producers and forcing consumers of seeds and medicines in the South into dependency and often destitution. They point out that the capitalist countries of the North industrialized without the constraints of a patent regime which they have now imposed on the developing world. Central to their struggles in the local, national, and transnational legal and political arena is the question: who sets the rules for the processes of globalization and according to which norms? These movements are raising issues of food security and farmer's rights but more generally of social justice, democratization of global governance and the legitimacy of international institutions and legal regimes.

For example a public hearing was organized in September 2000 in the south Indian city of Bangalore by several NGOs, women's groups, agricultural worker's unions and farmer's movements on the effects of the WTO regime of intellectual property rights on the lives of Indian farmers. At this'seeds tribunal' many farmers testified to the destruction of biodiversity in their regions, to the sale of kidneys by family members to meet the rising expenses of agricultural inputs, to suicides by farmers caught in a debt trap due to the high price of seeds by multinational corporations and subsequent crop failure, but also to the inadequate and poor quality of the public distribution of seeds which facilitates the entry of foreign multinationals in this sphere and to the resultant market dependency and indebtedness of small peasants. The farmer's organizations passed a resolution calling on multinationals like Monsanto to "Quit India" echoing Mahatma Gandhi's slogan coined in 1942 at the height of the national movement against British domination. They called for a boycott of seeds by Indian subsidiaries of multinationals so long as the former do not become independent of these foreign firms. They also vowed to maintain the food sovereignty and seed sovereignty of farmers and protect it from multinational companies while declaring that they will not obey any patent law or plant variety protection law under the WTO regime which consider seeds to be the private property of these corporations. They demanded that seeds and food be excluded from the TRIPs (Trade Related Intellectual Property Rights) regime of the WTO and advocated the reintroduction of the quantitative restrictions on agricultural imports removed recently by the Government of India in consonance with WTO provisions for trade liberalization.

2.2. Cunning Rather Than Weak States? Contesting the Limits to State Autonomy

At the this public hearing the jury, consisting of eminent jurists, intellectuals and activists, envisaged a central and active role for the state in the protection of the livelihoods of farmers in India. It recommended improvement of the public distribution of seeds; the setting up of regulatory bodies to ensure good quality agricultural inputs; a ten-year moratorium on the introduction of genetic engineering in food and farming; representation for farmers in the agricultural prices commission; and

guaranteed minimum agricultural support prices. But the jury's diagnosis of the "silence of the state" on the issue of farmer's rights presumes a state which is either unaware or inactive on this issue. However, the Indian state has been anything but silent as the introduction and passage of new legislation like the Patents (Second) Amendments Act 1999, the Protection of Plant Varieties and Farmer's Rights Bill 1999, and the Biological Diversity Bill 2001 shows. A harsh critique of the state coupled with an appeal to it to protect the rights of vulnerable groups reflects some of the ambivalence of civil society actors with respect to the state, whom they view as both opponent and ally. Under conditions of economic and legal globalization the state is simultaneously seen as in collusion with multinational corporate interests and as protector of national sovereignty. But can the Indian state be relied on to reform its policies in favor of its vulnerable citizens rather than in favor of global capital? This depends on whether the state has not only the capacity but also the will to do act in the interests of its citizens. My contention is that we tend to misrecognize cunning states as weak ones. Weak states can not protect their citizens whereas cunning states do not care to.

The global harmonization of differing national systems of patent law illustrates some of the complexities of legal globalization and the contradictory role of the state in it. There is no global patent law; the field is still regulated on the national level with the exception of the EU. But the WTO's TRIPs regime imposes powerful constraints on the sovereignty of nation-states both with regard to the content and timing of national laws which have to conform to the new WTO regime. The extent of national autonomy under the *sui generis* system available as an option under the TRIPs, which NGOs would like their governments to exploit, remains highly contested with mounting pressure against it from genetic technology exporting nations like the USA and Argentina. However, despite legal transnationalization and the growing importance of the WTO, the state remains an important arena of law production. Despite the fact that India had an elaborate and functioning legal framework in this area, it has had to amend its patent laws. In addition to only patents on processes which were permitted earlier, the country has had to introduce patents on products in confirmity with the TRIPs regime. In consonance with WTO requirements it has had to also enact laws on plant varieties and breeder's rights in order to permit for the first time the patenting of agricultural and pharmaceutical products. However, even within the WTO framework, there are some choices which states can make if they have the political will to protect the more vulnerable of their citizens. Instead of exercising these limited choices at its disposal, the Indian state chose to portray itself as utterly powerless to protect the interests of small farmers. It chose to lay all responsibility for the new national legislation on the constraints imposed by the supranational regulatory framework alone, thus absolving itself of any accountability towards citizens for its own political decisions.

As Gene Campaign[2], an Indian NGO, has pointed out the GATT/WTO requires member states to legislate either a patent regime or an effective *sui generis* system to protect newly developed plant varieties. The new transnational regulatory regime does not enjoin states to follow the UPOV[3] model laid down in the International Convention for the Protection of New Varieties of Plants. The Indian state, therefore, had a choice to opt for a *sui generis* system more suitable to the Indian context, an option it did not exercise. The UPOV system is based on the needs of industrialized countries where agriculture is a commercial activity unlike in acountry like India with a large majority of small and marginal farmers. As the Gene Campaign points out, the UPOV model thus protects the rights of big companies who are the major producers of seed in the North in a context where seed research is conducted in private institutions for profit. It is thus at odds with Indian realities where not only is most research in the area done in public institutions but where farmers are seed producers and have individually and collectively conserved genetic resources. The Gene Campaign, therefore, advocates that instead of basing its new patent regime on the unsuitable UPOV system, the Indian state choose the *sui generis* option within the WTO framework to enact legislation of its own which would adequately protect the rights of its farmers as producers and consumers of seed.

Moreover, as many critics of the Uruguay Round in India have pointed out, contrary to its rhetoric of creating a level playing field**,** many WTO rules tilt the balance further against the countries of the South. Theoretically, it may be the case that the latter who are net losers from the TRIPs regime, could offset such losses by gains from textile or agricultural trade liberalization. However, most countries of the North, which have been very slow to comply with their commitments in this regard, can take recourse to the very extensive safeguard provisions for agricultural and textile trade. The TRIPs agreement lacks any such provision that would permit countries to reimpose tariffs temporarily in case losses to domestic producers are heavier than expected. So though the costs of implementing the TRIPs regime has turned out to be much higher than anticipated for most developing countries, the Agreement merely allows for a certain grace period for implementation. Many of the developing countries, including India, therefore, would like to re-open for negotiation

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[2] Gene Campaign, founded in 1992, is a research and advocacy organization based in New Delhi, India working on the issues of protection of genetic resources and indigenous knowledge as well as the rights of farmers, local communities and indigenous people to the use of these resources without hindrance. It is a combination of an expert NGO and a grassroots level organization working in 17 states in India and its work is focused on ensuring food and livelihood security for rural and indigenous communities. It has played a significant role in raising public awareness of these issues through media campaigns, and in influencing the formulation of national policies on international property resources, biodiversity and international trade.

[3] The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization with headquarters in Geneva (Switzerland). It is based on the International Convention for the Protection of New Varieties of Plants, as revised since its signature in Paris on December 2, 1961. The objective of the Convention is the protection of new varieties of plants by an intellectual property right.

those compromises which they made in the Uruguay Round under imperfect information and the threat of unilateralism by the USA.

2.3. A Plurality of Conflicting Supranational Legal Regimes

Two of the strategies that have been adopted by subaltern states faced with structural adjustment conditionalities and several supranational legal regimes is to delay implementation at the national level and to exploit the existence of a plurality of international laws and treaties, which often contravene one another. India along with African and five Central and Latin American countries has called for a review and an amendment of the TRIPs Agreement of the WTO and a five-year moratorium on its implementation. The Organization of African Unity and India have demanded that the TRIPs regime be brought into consonance with the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources which would result in the exclusion of life forms from patentability and the protection of innovations by local farming communities. The Indian government has pointed out that its obligations under the TRIPs run counter to some of its obligations under the Convention on Biological Diversity. However, the sanctions under the former which permit, e.g., cross retaliation in any area of trade are much stronger compared to the weak enforcement mechanisms of international environmental laws. Indian NGOs along with transnational networks like GRAIN[4] and RAFI[5], for example, have been using this plurality of transnational legal regimes to question the legitimacy of the WTO TRIPs framework which contravenes provisions of the Biodiversity Convention or the Protocol on Biosafety on genetically modified life forms and does not conform to the earlier International Undertaking of the FAO which explicitly recognizes Farmer's Rights to seeds.

A plurality of norms at the national and international levels and their collision may not necessarily be detrimental to the protection of the rights of local communities. It could afford a space for states, if they are politically inclined to use it, to protect the rights of their vulnerable citizens. The question is whether within the constraints imposed by the processes of neo-liberal globalization and its new institutional architecture, a state has the political will to use all the available legal space to further and protect the interests of the poor and marginalized sections of its population. Or

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[4] GRAIN is an international non-governmental organization which promotes the sustainable management and use of agricultural biodiversity based local knowledge and on people's control over genetic resources.

[5] The international NGO, Rural Advancement Foundation International (RAFI), now renamed ETC group, addresses issues of conservation and sustainable advancement of cultural and ecological diversity and human rights. It supports the socially responsible development of technologies useful to the poor and marginalized and addresses to this end international governance issues and corporate power at local and global fora.

does the national political elite gain instead by pointing to the shrinking capacity of the nation-state to choose policy options and enact its own legislation by laying responsibility for its laws and policies at the door of the World Bank, the WTO or the IMF and thus divest itself of political accountability to its citizens

2.4. NGOs as Mediators and Creators of Laws

The protracted struggle against the Dunkel Draft[6] and the TRIPs Agreement shows the variety of vital contributions to legal 'glocalization' made by transnationally linked NGOs and social movements in India. Just as they have represented the interests of the Indian farmers in international and transnational fora, they have also disseminated information on the legal complexities to the national press and local communities. Not only have their campaigns created public awareness of the issues involved, mobilized farmers and put pressure on the state but they have challenged in US and European courts the granting of patents to TNCs from the North over agricultural and pharmaceutical products and genetic resources in the South. In addition to mediating between the local and the national levels as well as representing local interests in supranational fora and contesting new legal regimes in various political and legal arenas, NGOs and advocacy groups are also engaged in the production of alternative norms weaving together norms from different sources. The Gene Campaign has drafted, for example, a Convention of Farmers and Breeders (COFaB) in 1998 as an alternative to the UPOV treaty which it considers ill-suited to conditions in India and in the South more generally. The alternative proposal recognizes both individual rights of farmers as breeders and collective community rights as well as common knowledge from oral or documented sources. It stipulates that the breeder will forfeit his right if the "productivity potential" claimed in the application is no longer valid or if he fails to meet the demand of farmers, leading to a scarcity of planting material, increased market price and monopolies. Moreover, it advocates that each contracting state be granted the right to independent evaluation of the performance of the seed variety under diverse local conditions before allowing patent protection. The 1999 Human Development Report of the United Nations Development Program commends the innovative draft of the Indian NGO as a "strong and coordinated international proposal" that "offers developing

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[6] The Dunkel Draft (named after the then general secretary of GATT, the General Agreement on Trade and Tariffs) was finalized in December 1991 and formed part of the Uruguay Round of multilateral trade negotiations launched in 1986 which ended in 1995 leading to the setting up of the WTO. The Dunkel Draft came in for severe and sustained public criticism in many countries of the South as it cancelled key concessions allowed under the GATT by the advanced capitalist countries to the underdeveloped countries. For example, its provisions prohibiting governments of developing countries from protecting home industries and agriculture for social reasons led to massive public protests by farmers all over India making Dunkel and the Uruguay round a household name much before ordinary citizens in the North were aware of issues of trade liberalisation, the intellectual property rights regime of the GATT/WTO and its impact on their lives.

countries an alternative to following European legislation on needs to protect farmers' rights to save and reuse seeds and to fulfill the food and nutritional security goals of their peoples" (UNDP, 1999: 74).

Social movements and NGOs in India have long been resisting a destructive and inhumane model of development. They have recently assumed salience not only as translators of national and international law at the local level but also as channels for the assertion of customary collective rights over local commons in national and international fora. As mediators linking the global with the local, social movements and grassroots NGOs with transnational connections are an important interface between nation-states, supranational institutions and local communities. Their entry into the national legal domain has been facilitated by the growth of judicial activism and public interest litigation but it has not been without its costs in terms of protracted legal battles with uncertain outcomes and the risk of depoliticizing an issue in the legal arena. Despite their equivocal experience with state law courts and supranational instances, social movements and NGOs across the country continue to use these arenas in their struggles for social justice. But after extensive consultations at the grassroots, they have also formulated alternative peoples' laws and policies on land acquisition, forests, rehabilitation or intellectual property rights in addition to holding public hearings on these issues (Randeria, 2001, 2002a). They have thus challenged not merely the monopoly of the state over the production of law but also its exclusive claim to represent the greater common good.

2.5. Fragmentation of State Law and Fractured Sovereignty

Transnationalization of law is accompanied by an increasing fragmentation of law and a fracturing of state sovereignty. State action becomes increasingly heterogeneous with state law losing its unitary and coherent character. For example, Indian patent laws have to be brought into conformity with several supranational legal regimes which may contravene one another like the WTO TRIPs regime and the Convention on Biological Diversity. Or Indian population policy, which is strongly influenced by the UNFPA (United Nations Family Planning Agency) and the USAID (United States Aid for International Development), has to be in tune both with the UN Cairo Conference Action Program with its emphasis on reproductive rights and with the Tirhat Amendment in the US Congress prohibiting US financial assistance to any national population program which permits abortion. The IMF and the World Bank loan conditionalities in the 1990s required far reaching changes in Indian tax laws, industrial licensing laws, trade liberalization. The dilution of labor laws demanded by them would contravene constitutional guarantees but would also collide with ILO (International Labour Organisation) agreements and ICESCR (International Convention on Economic, Social and Cultural Rights) provisions. The coexistence of these different logics of regulation by different institutions of the state, or in different areas of regulation, and sometimes within the same area of regulation results in a

new kind of legal pluralism, a pluralism *within* state law. This legal pluralism is linked, on the one hand, to the transnationalization of law (cf. Santos, 1995: 118) and, on the other hand, to the simultaneous operation of multiple transnational norms without their incorporation into domestic law.

2.6. Post-Colonial Continuities?

Let us return for a moment to the Sri Lankan farmer Ranjith de Silva who appeared as a witness for the transnational coalition of petitioners in the European Patent Office in Munich to challenge a US patent on a product of the Neem tree. His grandparents would certainly have been astonished to hear that products of a tree in their backyard could become, by the stroke of a European pen, the intellectual property of a US corporation and the US Department of Agriculture. But neither legal pluralism nor transnational law or jurisdiction would have been unfamiliar to south Asians of his grandparents' generation. The Privy Council in London, for example, had the ultimate authority to decide over their property disputes for they were subjects of the British Empire. And the family law which applied to the de Silva's family as members of the Catholic community always had a transnational dimension being a hybrid mixture of the prescriptions of the Roman Catholic Church and a variety of local practices codified by the colonial state into a homogenous Christian personal law. In disputes concerning land, British ideas of individual property and of 'eminent domain' would have collided with traditional norms of community access to natural resources and collective usufructuary rights throughout the colonial period, a point I shall return to below. So that in the South, for many critics of the current corporate driven neo-liberal globalisation it represents a recolonization of their future which signals the end of a short interlude of post-colonial national autonomy and sovereignty.

A sensitivity to the history of colonialism would be an important corrective to the presentism and Eurocentrism of most analyses of globalization with their propensity to overstate the singularity of the present and to posit a radical discontinuity between contemporary social life and that in the recent past. For example, when in the globalization literature references are made to an erosion of the sovereignty of the nation-state, or an increasing legal pluralism (both supranational and subnational), or a new hybridity of laws in the wake of their transnational export, transplantation, and domestication in different cultural contexts, these may represent new developments for societies in the West. From the perspective of the non-Western world, however, it may seem like an irony of history that, turning Karl Marx on the head, one could argue that today the former colonies mirror in many ways the legal future of Europe. This is especially striking with regard to phenomena such as transnational law and jurisdiction, supranational and subnational legal pluralism, the role of private actors in legal diffusion as well as the emergence of multiple and shared sovereignties. Like transnational corporations in the contemporary world, the British East India

Company, which began the process of introducing British law into India prior to its becoming a Crown colony, was a private trading company. The relationship between the state and private trading companies in European countries has not been clearly delineated in the past and present. Powerful, partly autonomous from the state, and seeking to escape from government control and metropolitan law, private trading companies in the 19th century, like their transnational counterparts today, have always relied on their respective governments to further their interests abroad. The "post-sovereign states" (Scholte, 1999) of the industrialized world increasingly resemble (post-)colonial ones in which the state has never enjoyed a monopoly over the production of law and has always had to contend with competition from within and beyond its borders. Critics of neo-liberal globalization in the South fear that like the colonial state, the post-structural-adjustment state today may have be simply reduced to implementing policies conceived of abroad.

3. Contesting the Lion's Share: Pastoral Communities, Biodiversity and the World Bank

International organizations like the World Bank introduce into the national legal arena concepts and principles which may be seen as 'proto-law' as they do not have the formal status of law yet but in practice often obtain the same degree of obligation. Moreover, through their credit agreements with the state they also introduce what may be described as 'project law' as an additional set of norms. Similarly, concepts like 'good governance', 'co-management', 'sustainability' etc. have all been elaborated in various international treaties, conventions, protocols though they are neither fully developed principles nor show internal coherence (Benda-Beckmann, K. von, 2001). At the national and local levels various sets of actors invoke them as competing with, or overriding, national laws, or use them to ground the legitimacy of national law as well as to advance claims against traditional rights and customary law.

Some of the paradoxes and contradictions of the possibilities of the coexistence of multiple and overlapping legal orders are evident, for example, in the controversy between environmentalist NGOs and the human rights groups which have been at odds with one another over the protection of the rights of lions *versus* those of the pastoralists in the Gir forest. Whereas the environmentalists champion the cause of wild life protection, the human rights NGOs have been concerned with securing the livelihood and cultural survival of the pastoral communities in the area. The powerful NGO, the Worldwide Fund for Nature–India (WWF–India) with its transnational linkages, draws its moral legitimation as representative of global stakeholders in the environment. It has used its financial resources and media connections to make a case for the displacement of the pastoralists who in its view endanger the survival of the lions. For example, as part of its campaign for the protection of biodiversity, it

filed a case in the Supreme Court against the Government of India for failing to implement national environmental laws and policies. Against such a narrow environmentalist agenda, which pits peoples' rights to access commons against conservationist goals, human rights NGOs and the local peoples' movement, supported by a South Asian and Southeast Asian network, have mobilized for the protection of traditional rights of access to, and use of, natural resources based on the customary rights of the pastoral communities. But instead of relying entirely on local norms to make their case, they have also invoked the doctrine of public trust, borrowing from its elaboration in recent US court decisions on environment. They invoke the principle of regarding the state as a trustee rather than as the owner of natural resources that are seen to belong to local communities dependent on them. The US doctrine of public trust is thus used by civil society actors in India to challenge the validity of the continued reliance by the Indian state on the colonial doctrine of 'eminent domain' which secures its sole control of forests, water, and mineral resources (Randeria, 2002a).

Issues relating to both biodiversity conservation and displacement have been at the center of the controversy surrounding the ecodevelopment project of the World Bank in the Gir forest.[7] The Gir sanctuary and National Park are located in Junagadh district with the Protected Area covering 1,412 square kilometers, out of which 258 square kilometers constitute the National Park with restricted access and complete displacement of the local population. The protected area is the last intact habitat of the Asian lion in the wild with about 284 lions estimated to be living in the area. According to the Forest department's own figures, there are 54 traditional hamlets of pastoralists (*nes*) with an estimated population of 2,540 within the area demarcated for the sanctuary (Ganguly, 2000). These families which belong to several Hindu castes of Rabari, Charan, and Bharwad, including two Muslim communities of Makrani and Siddi, raise livestock and sell milk products. They are collectively known by the occupational term Maldhari (owners of cattle).

In 1972 over 800 families of Maldhari were forcibly displaced from the area defined as the National Park. 600 of these families were resettled under an inadequate rehabilitation program that gave them land in villages near the sanctuary. This half-hearted attempt to turn pastoralists into farmers failed due to the poor quality of land made available to families which had no knowledge of agriculture and no access to the inputs required for cultivation. Within a few years, many successful pastoralists, who had been selling milk and milk products over long distances, were reduced to wage labor. In a survey conducted by the Forest Department in 1971, the families living within the area demarcated for the sanctuary as a Protected Area were divided into residents recognized as 'permanent', those deemed to be 'non-

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[7] I am grateful to Varsha Ganguly and Ashok Shrimali (SETU, Ahmedabad) for their generosity in sharing with me their experience of the struggle against the displacement of Maldharis from the Gir forest in the context of the World Bank ecodevelopment project and for giving me access to their material on the project and the campaign.

permanent', and those considered to be 'illegal'. Only the 'permanent' residents were granted a so-called 'Maswadi' pass, which entitles them to live with their families and graze their cattle within the Protected Area. This completely arbitrary division of the Maldhari communities has created families, and family members, with differential rights to residence and to carry on their traditional livelihood. It has also ruptured the social fabric making it difficult for those living outside the borders demarcated by the Forest Department to visit the sacred sites of their communities within the Gir forest. Daughters and sisters married into villages on the periphery of the sanctuary, for example, now have the status of 'tourists' who are required to pay for a daily pass to visit their natal kin living in the Protected Area.

The rights of the pastoralists to forest products, grazing land and water resources are sought to be overridden in the name of the greater common good by WWF–India and the state government of Gujarat. They argue that both the local ecological system and the lions are endangered by the traditional grazing methods for the large herds of livestock as well as by the Maldharis' increasing demands for the provision of modern infrastructure and other facilities in the area (such as tarred roads, electricity, schools, and health centers). Following the interim order of the Supreme Court in 1997 in the case filed by WWF–India, the Collector of Junagadh issued a notice evicting the Maldhari families from the Gir sanctuary in view of the proposed conversion of the entire area into a National Park. Human rights NGOs and people's organizations in the Gir area have so far been able to prevent forced displacement as it contradicts the terms of the ecodevelopment project agreement between the World Bank and the government of India. In terms of the overriding commitments accepted by the Government of India in its agreement with the World Bank (World Bank, 1996), for the limited duration of the project and within the six biodiversity project areas, World Bank policies safeguarding the rights of indigenous peoples and protecting those affected by a project from involuntary resettlement prevail over state laws. However, it is far from clear whether these conditionalities will have any permanent or pervasive impact on national resettlement policies or environmental laws.

The Wildlife Protection Act drafted with the expert advice of the Smithsonian Institute (USA) in the 1970s and adopted by the Indian Parliament has provisions for declaring certain areas as 'protected areas' for purposes of setting up national parks or wildlife sanctuaries. Aimed at environmental conservation, it also contains procedures that work in practice to the detriment of the rights of local communities in these areas. WWF–India has found an ally in the Gujarat government and the two have teamed up to protect the environment using national legislation, whereas human rights activists have found an ally in the World Bank—which is committed to the standards laid down in its own operational directives and policies that protect project-affected persons from forced eviction and guarantee the traditional rights of indigenous communities. These also provide for a participatory resettlement and rehabilitation of families affected by a project in a manner which protects their living standards, earning capacity and production potential and further stipulates that these

should not deteriorate as a result of a World Bank project. So that ironically, the displacement envisaged by the Gujarat government and the WWF–India in consonance with national law has been temporarily averted by NGOs invoking World Bank norms. As the displacement would have contravened credit conditionalities accepted by the Government of India as signatory to the agreement with the World Bank, the federal government prevailed on the regional government to stop all forced eviction. But this fine balance is likely to last only as long as the World Bank project does.

In order, therefore, to anchor peoples' rights to natural resources in a more permanent policy framework beyond the short-term validity of the project law of the World Bank, human rights NGOs have advocated more systematic changes. They would like a program of joint participatory management of national parks and sanctuaries modeled on the Joint Forestry Management programs in which local communities and the state act together to preserve the forests. These joint conservation programs are premised on the assumption that local communities, especially indigenous people, are the best protectors of their environment. Having lived in a symbiotic relationship with nature since centuries, they are assumed to have a traditional way of life and alternative local knowledge that enables them to live in harmony with their environment. Apart from the tendency to romanticize indigenous people within a global anti-statist environmental discourse that valorizes local knowledge (Benda-Beckmann, F. von, 1997), a primarily ecological view makes the local community's access to commons contingent on their conservation skills and intentions (Benda-Beckmann, K. von, 1997) rather than framing the question in terms of their rights to land, forests, and water for their livelihood. It may thus freeze the cultures and lifestyles of these communities in time, so that an obligation to continue with their traditional way of life is a price they may have to pay for their non-displacement from their ancestral lands and forests. Demands by Maldhari communities in the Gir forest for modern amenities like electricity, or metalled roads linking their settlements (*nes*) with the markets for their dairy produce outside the protected area, are rejected by the WWF–India and the Forest Department in the name of wildlife conservation. What appears at first sight to be the autonomy to pursue their own way of life may turn out to be an obligation to do so, an "enforced primitivism" (Wilder, 1997: 217) in the interests of biodiversity and the Asiatic lion.

4. Civic Alliances Contest State Control over Natural Resources

Human rights NGOs present a case for peoples' rights over natural resources which goes much beyond the highly limited protective approach to displacement outlined in the World Bank policy as well as the sympathy for the mere participation of local communities as conservationists in the global environmental discourse. An all-India network of NGOs has recently challenged the very basis of such a policy, and of

national laws, which recognize only individual rights for purposes of compensation disregarding the collective rights of communities to access natural resources. The Campaign for Peoples' Control Over Natural Resources is a large new nationwide coalition of NGOs, including one from Gujarat, which seeks to reassert and protect the collective customary rights of local communities (e.g. pastoralists, fishing communities, marginal and poor farmers, landless laborers, and indigenous peoples) to land, water, and forests. Apart from court battles, many of the NGOs involved in the new network have been involved in local mobilization and resistance on these issues for several years.

The entire problem of access to, and use of common property resources, has acquired a new urgency due to the policies of liberalization and privatization introduced by the Indian state under the directive of the IMF and the World Bank. The central government itself admits in the new draft National Policy for Rehabilitation of Persons Displaced as a Consequence of Acquisition of Land that economic liberalization and an increase in private investment will generate a greater demand for land as well as for mineral resources and reserves located in regions inhabited primarily by tribal communities. Yet instead of a just and humane rehabilitation policy (based on a process of consultation and respect for democratic rights of the displaced, which would take into account the ground-level realities and complexities of land use and traditional rights to commons) the new policy only seeks to ensure efficient expropriation and legal security in the interest of investors. Increasingly, areas seen as 'wasteland', forests, and coastal areas under special environmental protection through the Coastal Area Zonal Plan are being acquired by the state and made over to industries at nominal prices. That such iniquitous development destroys the traditional agricultural, pastoral or other patterns of livelihood of those who are forcibly displaced, economically marginalized, and rendered assetless seems to be an acceptable price for inexorable industrial growth and progress. Here is where the 'enabling state', representing the sectional interests of the rich in the name of 'national interest', comes increasingly into conflict with those of its citizens living in poverty who are dependent on common property resources of land, water, and forests for their survival. Paradoxically, the proliferation of national and supranational environmental and human rights law, and an expansion of its scope, goes hand in hand with the erosion of the collective rights of communities, their traditional access to the commons and their right to determine for themselves a vision of the good life. Ecologically sustainable agriculture or pastoralism, which is either at the level of subsistence or produces for the market without large-scale commercialization, finds no place in official plans and policies. In the view of capitalist development shared by the state and the World Bank, 'backward' peasants, pastoralists, and tribal communities are to be modernized through integration into the 'national mainstream' and the market economy. The promise of industrial wage labor is held out as a stepping stone to higher income and skills for setting up independent business, a mirage of mobility into the middle classes which is no more than "a myth inspired by wishful thinking" as Jan Breman in his trenchant critique of the 1995 World Bank Development Report has argued (Breman, 1997: 88).

Liberalization has meant a shrinking of state responsibilities but not a shrinking of state apparatus just as it has not led to less state interventionism but rather to state intervention in favor of capital (Randeria, 1999). Through a combination of legislative and executive measures, the Indian state has been seeking to undermine the access and control of local communities to their natural resources. As the Campaign for People's Control Over Natural Resources[8] has pointed out in its appeal published in November 2000, the increasing pressure of privatization and industrialization under the neo-liberal regime is eroding people's rights to land, water, and forests, turning theses common resources into sources for private profit. The Campaign has drawn attention to two extremely worrying recent developments in this regard—the proposed amendments to the Land Acquisition Act of 1894 and the proposed amendments to the Schedule V of the Constitution.

Of colonial provenance, the Land Acquisition Act of 1894 (revised in 1986) enables the state to acquire land for a public purpose without recognition and protection of people's right to their natural resources and without consulting them beforehand. The post-colonial state has so far used it to dispossess and displace some 30 million people for large-scale dams and irrigation projects, urban development schemes, wildlife parks and sanctuaries. Most of those forcibly evicted have been the rural poor and about 40 percent of the displaced belong to indigenous communities whose rights the government of India as a signatory to the ILO Convention 107 is obliged to protect. They have hardly received any adequate compensation in the absence of a national law or policy on resettlement and rehabilitation which has been a long-standing demand of NGO networks who have presented an alternative draft peoples' policy on rehabilitation for public discussion.

Under the new policies of economic liberalization, there has been a rapid increase in land alienation by the state on behalf of private industries and mining companies. Simultaneously, there has been an increase in both spontaneous, sporadic, unorganized local resistance to these developments as well as more organized protest through networks of NGOs and social movements throughout the country. As the Land Acquisition Act of 1894 only enables the state to acquire land for a *public purpose*, the central government is now proposing to amend the law to allow confiscation of land by the state on behalf of private industries and to introduce only cash compensation instead of providing new land for resettlement and cultivation. Ruling in a case where farmers had challenged such acquisition, the Supreme Court recently defined the setting up of private industry to constitute 'public purpose' thus permitting land acquisition by the state for use by private companies. A network of NGOs has started a nationwide campaign to protest against the proposed amendments and have drafted an alternative new Land Acquisition Act. Challenging this redrawing of the boundary between the public and the private, they advocate a

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[8] My thanks to Achyut Yagnik (SETU, Ahmedabad) for clarifying many of the issues raised in this paper in the course of discussions about the network and the campaign as well as for providing me documents relating to it.

participatory process of legislative amendment and a right to information rather than the shrouding of these new laws and policies in secrecy.

In September 1997, the Supreme Court had given an important judgment restraining state action and upholding the rights of Adivasi communities (indigenous peoples) to life and livelihood and to land and forests in Scheduled Areas reserved for them by the constitution. Responding to a case filed by Samata, an advocacy group for Adivasi rights in Andhra Pradesh on the issue of mining in Scheduled Areas, the Court had held that government or tribal community-owned forests and lands in these areas cannot be leased out to non-tribal or to private companies for mining or industrial purposes. It declared all such leases by various state governments to be null and void as they contravene Schedule V of the Constitution. It decreed that mining activity in these areas could only be carried out by the state Mineral Development Corporation or a cooperative of the tribal communities subject to their being in compliance with the Forest Conservation Act and the Environment Protection Act (SETU, 1999). The Supreme Court also recognized that under the 73rd Amendment to the Constitution, organs of local self-government at the village level like the Gram Sabha and Panchayats are competent to preserve and safeguard the natural resources of the community and thus once again it reiterated the right of self-governance of Adivasi communities.

This landmark judgment, known as the Samata judgment, was an important check on the illegal practices of the state that encouraged an uncontrolled commercialization of land, forests and water. The Supreme Court dismissed the subsequent appeals by both the regional state government and the federal government that tried to overturn this decision against an environmentally unsustainable and economically inequitable industrialization. Under pressure from multinational corporations and Indian industry, the federal government has been seeking avenues to circumvent the judgment. The Ministry of Mines proposed, for example, an amendment to Schedule V of the Constitution with a view to remove all restrictions on the transfer of tribal and government lands in Schedule Areas. The proposed amendment of the Schedule V, was to be brought to discussion in Parliament during the winter session of 2000–2001, and would have permitted land acquisition by the state on behalf of private companies not only for public purposes but also for engaging in production for private profit. The amendment did not foresee any participatory process in which public purpose could be determined jointly by those communities whose rights to land, forests, and water, and rights to a traditional way of life and livelihood are to be affected adversely. NGOs and social movements, who had been demanding such a consultative process and guarantees of protection since many years, have succeeded so far in blocking the legislation from entering the national legislature.

5. Transnational Coalition against the Narmada Dam: Global Victories, Local Failures

Given the fact that more and more citizens are now directly affected in their daily lives by the working of international institutions and their policies, it is not surprising that they choose to address these institutions directly with their protests, bypassing the national parliamentary arena in an attempt to transnationalize an issue. However, leapfrogging the national political arena through the use of campaign coalitions focusing on transnational arena of action and jurisdiction comes at a price. Many of the ambivalences of this emerging global civil society are well illustrated by the long drawn-out struggle against the building of the Sardar Sarovar dam on the river Narmada by the Narmada Bachao Andolan (Save Narmada Movement) in Gujarat, together with a network of national and transnational NGOs in Europe and the U.S.A. The World Bank was eventually forced to withdraw its financial support comprising some 18 percent of the costs of the dam and 30 percent of the expenditure on the canals. Highly detrimental to the environment, the project was originally expected to displace 70,000 people (an estimate which had to subsequently officially revised to 120,000) from a submergence area of approximately 370 square kilometers (Morse and Berger, 1992). The World Bank itself conceded that it was later discovered that the construction of the canal network of 75,000 km would lead to the eviction and resettlement of at least about another 120,000 people which had neither been planned for in the project nor taken into account at the time of its appraisal by the Bank (Shihata, 2000).[9]

Protest among the displaced communities had initially concentrated on issues of just compensation for the loss of land and livelihood, fair resettlement and rehabilitation policies and their implementation. Transnational linkages with the campaign against multilateral banks led over time to a shift of agendas and priorities. As local mobilization and strategic action came to be focused increasingly on ending the World Bank funding for the project, local grievances came to be articulated increasingly in terms of an environmental discourse which would have international legitimacy and legibility. Gradually a radical 'no large dams' agenda, for which there was growing transnational support, eclipsed concerns about appropriate technological safeguards, displacement, equity, and justice. The vocabulary of the movement as much as the timing of local action was determined by the demands of the global arena and transnational constituency-building instead of seeking to work through regional and national political institutions. Some of the complexities and contradictions of the campaign involving several Indian NGOs, environmental rights

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[9] Estimates of the number of people to be displaced vary widely and is a highly contested issue between the state and the movement. Irrespective of these competing claims, the Indian state has a dismal record of development induced displacement and the failure to rehabilitate those forcibly evicted. Large dams alone have displaced 16–38 million Indians since 1947, 75 percent of whom are still to be rehabilitated. See the report of the World Commission on Large Dams (2000: 104, 108).

groups in the USA, development aid groups in Europe (especially Germany), Japan, and Australia are explored in Jai Sen's (1999) excellent ethnography of the struggle against the dam. It traces the emergence of a new modality of transnational social action, the transnational advocacy network (Keck and Sekknik, 1998), and delineates how the dynamics of local resistance came increasingly to be shaped by the choice of the arenas of negotiation and the structures of the international institutions used as levers of power. The successful strategy whereby social movements and NGOs in the South link up with powerful Northern and especially North American NGOs to use US Congressional hearings as a forum to reform multilateral development banks in general, and the World Bank in particular, has some unintended consequences. It not only reinforces existing asymmetries in power between the North and the South, both at the level of NGOs and national legislatures, but also lends greater legitimacy to these international institutions and the US Congress. Leapfrogging the national parliamentary arena and addressing directly the World Bank, and putting pressure on it through the United States Congress and the executive directors of industrial countries, further diminishes the legitimacy of subaltern states in the South.

The movement in the Narmada valley, and the transnational campaign supporting it, led to several unintended long-term structural changes but these were in Washington, DC rather than in India. Jai Sen (1999) argues that, paradoxically, the campaign thus reduced democratic control over the structures of the World Bank by increasing the control of the US Congress and the concentration of power of the major share-holding states of the North (G–7 members control about 60 percent of the vote) over the staff of the World Bank. However, the campaign also resulted in internal changes of control and review mechanisms at the World Bank. Among the latter is the revised information disclosure policy which lays down that specific project information pertaining to environment and resettlement be made known to those affected by the project prior to its appraisal (Udall, 1998). It also contributed to the setting up of the Inspection Panel at the World Bank, which is discussed in the next section, as well as of the World Commission on Large Dams, a forum for the negotiation of a new set of international ecological and human rights standards for large dams in which all stakeholders could participate (World Commission on Large Dams, 2000).

The experience of Indian citizens at a transnational fora like the Inspection Panel have been disappointing, as I will discuss in the next section. But developments at the national level after the withdrawal of the World Bank from the project have not been encouraging either. The Narmada Bachao Andolan's failed attempt to seek judicial remedy in the Supreme Court of India exposed some of the limitations of the use of national courts as arena for social justice as well. It has been as difficult to make an international institution like the World Bank conform to its own resettlement norms and environmental standards as it has been to get judicial remedy against a state which has constantly flouted its own laws and policies. Despite a controversial and prolonged public debate in India the issue has neither been seriously debated in the national parliament nor have any legal or policy changes taken place with respect

to mega-dams, land acquisition, involuntary displacement, or resettlement and rehabilitation. The movement in the Narmada valley sought to radicalize the 'damn-the-dams' agenda into a critique of the ideology of gigantism in developmental practice and to broaden national policy to include models of an alternative future based on small local autonomous projects. But having decided to go to court, it was caught up for years in the Supreme Court negotiating technicalities like the height of the dam. And the government could justify its inaction with respect to policy changes by pointing to the *sub judice* status of all the issues before the court. In retrospect, the withdrawal of the World Bank from the project may seem like a mixed blessing as under pressure from NGOs in Gujarat, some Bank staff and missions had sought to enforce rehabilitation policies and their implementation. The relative improvement in policies and their enforcement in Gujarat as compared to Madhya Pradesh and Maharashtra can be traced to this donor pressure.

In its writ petition filed by the Narmada Bachao Andolan (NBA) against the federal government in 1994 the movement had asked for a ban on the construction on the dam. It sought this judicial remedy under Article 32 of the Indian Constitution that guarantees every citizen the right to appeal to the Supreme Court in defense of the enforcement of his or her fundamental rights. The NBA contended that the magnitude of displacement caused by the dam was such that a total rehabilitation of those whose land was to be submerged by the project was impossible. More fundamentally, the NBA raised the question of who has the right to define the greater common good and according to which criteria. Whose interest may be defined as the national interest when the interests of the displaced collide with those of future beneficiaries? Can a merely utilitarian calculus (a larger number of potential beneficiaries as compared to the victims) be used to deny poor and vulnerable communities their right to life and livelihood? Is it legitimate for the state to declare one set of partial interests, those of the rich farmer lobby, industrialists, and contractors, to be synonymous with the public good? The NBA thus challenged the very assumption that the state, by definition, acts in public interest and asked for an independent judicial review of the entire project, including its environmental, economic, and human costs.

In response to the petition, the Supreme Court halted further construction on the dam from 1995 to 1999 while asking for reports from the three state governments on the progress in the rehabilitation of 'oustees' as well as on future provisions for them along with expeditious environmental surveys and plans to overcome hazards. In the hearings in 1999, the counsels for the state government of Gujarat had asked the Court to give a clear signal in favor of the dam so that foreign investors would be encouraged to invest in it (Sathe, 2000). It is difficult to judge how much weight the argument carried in the Court's decision to allow construction to be resumed although not much progress had been made on either rehabilitation or environmental assessment. But the argument reflects the priorities and concerns of the government of Gujarat, which chose to privilege the right to security of foreign investment over the fundamental rights of its own citizens.

The final verdict of the Indian Supreme Court in October 2000 was a grave denial of justice as well as a severe blow to people's movements. Moreover, it raised fundamental questions about the very limitations of the use of law courts by social movements in their struggle for social justice. For it took the apex court six and a half years to come to the conclusion that the judiciary should have no role in such decisions! The majority judgment dismissed all the objections regarding environmental and rehabilitation issues relying entirely on the affidavits given by the state governments. It merely asked the Narmada Control Authority to draw up an action plan on relief and rehabilitation within four weeks. As critics of the judgment pointed out, it is hardly likely that the state government will do in four weeks what it had failed to do in 13 years. The majority judgment, which praised large dams and their benefits for the nation, permitted not merely the construction of the Narmada dam but by questioning the *locus standi* of social movements as public interest petitioners, it also sets limits on the future legal options for collective action by citizens against the state. Despite decades of resistance by the victims of development in the Narmada valley, who have borne the brunt of state repression and violence, there has not been much rethinking in state policy on the basic issues raised by the movement--forced displacement, ecological destruction in the interest of industrial development, the search for more environmentally sustainable and socially just alternative models of development which respect cultural diversity and the right of communities to determine their own way of life.

6. Governance Beyond and Within the State: The World Bank Inspection Panel

A major achievement of the transnational campaign against the Narmada dam was the establishment of an independent Inspection Panel at the World Bank in 1993. It was set up in response to pressure from NGOs for more transparency and accountability as well as to threats from influential members of the United States House of Representatives to block further US contributions to the International Development Association (Udall, 1998). The Panel is by no means a full-fledged body for adjudication, but provides a forum for an appeal by any party adversely affected by a World Bank funded project. The primary purpose of the Inspection Panel is to examine whether the Bank staff has complied with its own rules and procedures and its influence on policy formation within the World Bank is probably limited (Kingsbury, 1999). Barring a couple of exceptions, claims before the Panel so far have only had limited success as Bank staff has usually teamed up with the borrowing country in question to deny any violations. Together they have subverted full-fledged field investigations by the Panel by hastily drawing up remedial action plans for the future. The larger and powerful borrowing countries have supported each other on the Executive Board of the World Bank in resisting investigations that they regard as an infringement into national sovereignty. So the Panel has been

increasingly used by civil society actors, as much to publicize the violation of international environmental and human rights norms by their own governments and to pressurize these into compliance as to seek remedy against the World Bank's non-implementation of its own operational policies.

Among the 17 requests entertained by the Panel until mid-1999,[10] two were related to projects in India: the National Thermal Power Corporation (NTPC) power generation project in Singrauli in 1997 and the ecodevelopment project (of which the Gir project discussed earlier is a part) in the Nagarhole National park in Karnataka in 1998 (Umaña, 1998). In both cases it was alleged that the Bank management had failed to comply with its own policies on environmental assessment, the displacement of indigenous people, and involuntary resettlement. The request regarding serious flaws in the design and implementation of the ecodevelopment project was submitted by an Indian NGO representing indigenous people living in the Nagarhole National Park. It submitted that no development plans had been prepared with their participation as laid down in Bank guidelines because the project had simply not recognized the fact that they resided within the core project area. The forced displacement of these Adivasi communities from their forest habitat would not only disrupt their socio-cultural life but also destroy their means of livelihood. Although the Bank staff denied any breach of policies and procedures, the Panel, after studying the written documents and a brief field visit, recommended that the Bank's Board authorize an investigation. The Panel felt that "a significant potential for serious harm existed" (Shihata, 2000: 135) as key premises in the design of the project appeared to be flawed. In view of the meager information available to the Bank staff, the Panel felt that the staff could not have been able to foresee during the project appraisal how the project could harm the Adivasi population in the park. Rather than consultations with them *prior to* the project as required by the operational procedures, Bank management stated that it was envisaged to ensure their participation in the implementation stage. Shihata, the then Chief Counsel of the World Bank and a senior Vice President, himself admits that such an approach involves the risk of non-compliance with the World Bank policy of consultation and participatory planning, a "feature, though apparent, was not explained at the time the project was presented to the Board for approval" (Shihata, 2000: 134)!

The Panel noted that in violation of the guidelines on involuntary resettlement, no separate indigenous people's development plan was prepared at the appraisal stage and no 'micro plans'—through which individual families and groups in the protected area can express their needs and get financial support—were under preparation for the Adivasi families, 97 percent of whom wished to remain in the National Park (Umaña, 1998). Despite these findings, and the potential of serious negative impact of the project on the indigenous communities in the area, the Bank's Board decided not to authorize any investigation in 1998. Instead it merely asked the management,

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[10] For a detailed analysis of the history of the Panel, its procedures and of the cases before it so far, see Randeria (2001).

together with the government of Karnataka and the affected people, to address the issues raised in the Panel's report and intensify project implementation and microplanning. Given the long history of non-compliance with Bank guidelines both by its own staff and by the government of Gujarat in the case of the Narmada Dam project, as amply documented in the Morse Commission report commissioned by the World Bank, the Board's decision is a cause for concern. Besides the power of the Bank staff, it reflects the success of executive directors from borrowing countries, including India, as a bloc in thwarting Panel investigations which they regard as an infringement of their national sovereignty. Under these circumstances, NGOs continue to be skeptical about the independence of the Panel, of its limited mandate and of the difficulties of access to it for people affected adversely by World Bank projects all over the world (Udall, 1997).

In response to the request to the Panel for looking into the NTPC power generation project in Singrauli, the World Bank management conceded, for the first and only time in its history so far, its partial failure to implement some of the Bank's policies. It submitted to the Panel a detailed action plan of corrective measures agreed upon with the government of India. After a review of the records and a brief preliminary field visit, the Panel concluded that although the guidelines regarding indigenous people had not been breached, the possibility of serious violations by the Bank of policies and procedures relating to involuntary resettlement and environmental assessment need investigation. The Panel's investigations confirmed these violations and it noted in its report that the failure "appear(ed) more serious than previously assumed" (Shihata, 2000: 132). The Indian government, however, denied permission to the Panel for a full field-based investigation into the complaints leading the World Bank Board to allow only a desk review of the project. And the Panel watched helplessly as the World Bank remained inactive in the face of a backlash in Singrauli as reprisals against the villagers, harassment and intimidation by local police and project authorities increased.

One is rather surprised to learn from Shihata's account that after this the "Management concluded that 'valuable lessons were learned' from intensive reflection on the request (in the NTPC case) and continued to place emphasis on the implementation of the action plan" (Shihata, 2000: 132)! A decade after the World Bank's and the Government of India's serious violations of environmental and resettlement policies led to the withdrawal of the Bank from the Sardar Sarovar project, one is surprised by the poor institutional memory of the World Bank. Even in the absence of legal liability, what surprises is the World Bank continued lack responsibility towards those affected adversely by its projects as well as its infinite faith in the borrowing government's political will and capacity to implement environmental and human rights conditionalities. It is difficult to understand both the lack of World Bank supervision of project implementation and more generally its continued insensitivity to the social and ecological costs of the kind of development it advocates and finances. Despite the failure of the government of India to issue a national resettlement and rehabilitation policy since decades, the World Bank

surprisingly continues to advance credits to it for development projects involving forced displacement. This raises doubts as to the World Bank's seriousness in ensuring compliance with its own credit conditionalities and operational policies. It is not as if the Bank as an institution has not learnt from its past mistakes. Many of the norms enshrined in operational policies reflect the experience of the Bank with the adverse effects of its earlier projects and are the result of sustained lobbying by, and consultations with, civil society actors and representatives of affected communities in many countries. So that World Bank standards often emerge from local sources and are then globally diffused to other international and bilateral development institutions and borrowing countries through their incorporation into Bank policies and practices. A good example of such a process is the norm of land-for-land compensation for those families being displaced by a World Bank project instead of the earlier cash compensation for land acquired by the state. This standard was introduced after the experience of forced displacement and the struggle against the Narmada Dam. But instead of ensuring compliance with it, it is being given up by the World Bank under pressure from borrowing governments and private industries.

Although the World Bank continues to claim immunity from legal liability for the adverse impacts of its projects, parallel to the setting up of the Panel, Bank management began to convert operational directives and policies which were binding on the staff into 'non-mandatory recommendations' or 'Best Practices'—which would render them 'Panel-proof' by placing them beyond the jurisdiction of the Inspection Panel. So that instead of the existence of the Panel affecting greater compliance by the Bank staff with the institution's own standards, the limited desk investigations by the Panel are already leading to a watering down of standards to make them conform to the Bank and borrower's common practice of non-compliance.

7. Conclusion

The empirical material analyzed here demonstrates the uneasy coexistence of several contradictory facets of processes of globalization and resistance to them. If financial and technical aid for the gigantic Narmada project is organized transnationally, so is the protest against human rights abuses, ecological destruction, and state violence. The World Bank simultaneously advocates economic policies in support of privatization and advances credits for large dams and polluting industries that *infringe* on environmental and human rights along with directives to *uphold* those rights. But states eager to follow its directives to create an enabling environment for capital are likely to be brought under the scrutiny of the Bank's Inspection Panel for non-implementation of environment conditionalities and failure to comply with rehabilitation standards. Paradoxically, a proliferation of supra-state governance and an increasing juridification of social life go hand in hand with the erosion of customary rights of the poor to common property resources. However, it may be easier to

protect these rights by invoking international norms, the World Bank project law or credit conditionalities than by relying on national courts and domestic policies.

In any case, the existence of multiple and overlapping transnational legal orders within a particular field may also present a third option for states with a political will and strong democratic institutions, an option between the unrealistic hope of restoring national legal autonomy and the equally utopian dream of an all-encompassing global regulation. National norms could be supplemented and strengthened through a multi-layered approach that could envisage various public and private actors acting within and beyond national borders to establish multi-level public and private regulatory regimes. Rather than pinning one's hopes on the state as a unitary source of normative order, it is important to see the new role of private actors, such as transnationally networked movements and advocacy coalitions, which create, mediate, and weave together norms from different systems into new regulatory webs. Instead of posing the problem in terms of a stark binary choice between national or global regulation, or between state law as opposed to community law, this paper has tried to sketch the contours of an emerging new landscape of "interlegality" (Santos, 1995), a mosaic of supranational regulation, national legislation, alternative people's treaties and policies, project law, traditional rights, and international laws. Any mapping of the changing contours of governance within and beyond the nation-state must trace these complex and contradictory connections between local actors and global discourses, between micro-practices and macro-structures.

As I have tried to show, in such a context the protection of the rights, lives and livelihoods of the most vulnerable citizens in the South will need shifting alliances between their representatives and the states or international institutions. Faced by cunning states and non-accountable international institutions, civic alliances in the 21st century will probably have neither permanent friends nor permanent enemies but only permanent interests. Changing coalitions according to context, rather than ideological affinities, are thus likely to characterize the politics of actors protesting pauperization and exclusion as they attempt to (re)claim rights to local and global commons.

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